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No. 96-1188

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IN THE

Supreme Court of the United States

October Term, 1996

Public Service Commission of the
State of New York, *et al.*,
Petitioners,

v.

Federal Energy Regulatory Commission and
United States of America
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY OF PETITIONERS PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

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REPLY OF PETITIONERS PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL. ("PSC" Petitioners")

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1. Although replies are to address "new points raised," Rule 15.6 of this Court's Rules, the most telling aspect of the briefs in opposition[1] is their studied indifference to *General Motors Corp. v. Tracy, Tax Comm'r of Ohio,* No. 95-1232 (U.S. Feb. 18, 1997). FERC completely ignores the case and PGC buries it. PGC Br. 2 and 15.

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[1] Briefs in opposition were filed by the Federal Energy Regulatory Commission ("FERC") and by the Process Gas Consumers Group, *et al.* ("PGC"). Those briefs will be referred to herein as "FERC Br." and "PGC Br.," respectively.

At bottom, the instant petition concerns whether States or FERC should oversee one aspect (release of LDC-owned pipeline capacity) of FERC's unbundling plan as it affects LDC customers. The *Tracy* decision analyzed the historical development of natural gas regulation, including dual jurisdiction under the Natural Gas Act ("NGA"), in the context of a continuing need for traditional regulation to protect small customers. *See generally, Tracy*, slip op. at 13-19. That analysis bears directly on the jurisdictional issue raised in the instant matter.

2. *Tracy* reaffirmed use of two tenets to guide evaluation of when state, rather than federal, regulation should apply to natural gas transactions. One tenet recognizes that federal authority under the NGA is designed to complement, not to override, state authority to protect consumers in matters of local concern:

> [T]he NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way,"; "the scheme was one of cooperative action between federal and state agencies" to "protect consumers against exploitation at the hands of natural gas companies,"; and "Congress' action . . . was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service."

Slip op. at 12 (citations omitted).

FERC and PGC ignore this well-established tenet in asserting the primacy of federal authority in any matter involving interstate transportation. FERC contends its "transportation jurisdiction is 'plenary' and extends to all transactions 'except those which Congress has made explicitly subject to regulation by the States.'" FERC Br. at 10 (citation omitted);

see PGC Br. at 13-14 (same). Because virtually all natural gas transactions (other than those where production and consumption occur in the same state) include an interstate transportation component, this reading of the NGA would result in FERC control of the entire industry.

Such intrusive federal authority was not intended under the NGA. Rather, the opposite is true: " 'the [NGA's] historical setting, legislative history and objects [] show [an] intention for the states to continue with regulation where Congress has not expressly taken over.' " *Tracy*, slip op. at 13 (citation omitted). Nor is FERC's jurisdiction over interstate transportation intended to usurp States' long-standing authority to regulate transactions between local distribution companies ("LDCs") and their customers. *See id.* ("Congress amended the NGA to 'leav[e] jurisdiction' over 'companies engaged in the distribution' of natural gas 'exclusively in the States, as always has been intended.' ") (citation omitted).

3. The importance of preserving States' authority over local concerns affecting small consumers is a second tenet to be evaluated in determining whether state, rather than federal, regulation should apply. "Regulation of natural gas for the principal benefit of householders and other consumers of relatively small quantities is the rule in every State in the Union. Congress has also long recognized the desirability of these state regulatory schemes." *Tracy*, slip op. at 26.

FERC and PGC contend that local concerns can be overridden by an overarching need for uniform, national regulation. See PGC Br. at 17 ("state regulation, even if nominally within a regulatory sphere reserved to the states by the NGA, must yield to FERC's jurisdiction if such state regulation would hinder or frustrate FERC's efforts to achieve comprehensive, uniform regulation of interstate transportation"); and FERC Br. 7 (same). Protection of consumers, not unformity of

regulation, is, however, the primary goal of the NGA. Protection of residential and small commercial consumers is best accomplished at the State level where local concerns can be fully addressed.

4. Giving states primary authority to protect local consumer interests neither denigrates nor frustrates legitimate federal concerns. Those concerns can be safeguarded by instituting broad national policies within which states have flexibility to address local concerns. FERC's earlier capacity release plan, superseded by the plan under review, engrafted broad "open-access" policies to interstate pipeline tariffs, but allowed private parties to adjust contract terms to fit specific needs, subject to State regulation. In contrast, the present plan imposes the federal will on all capacity release by LDCs without regard to local concerns affecting small customers.

Federal policies should be loathe to displace traditional state regulation, which can offer residential and small commercial customers access to competitively-priced, in-state gas or other benefits. "The size of the captive market, its noncompetitive character, the values served by its traditional regulation: all counsel caution before making a choice that could strain the capacity of the States to continue to demand the regulatory benefits that have served the home market of low-volume users since natural gas became readily available." *Tracy*, slip op. at 29.

5. PSC Petitioners present the issue of whether FERC or the States should control release of LDC pipeline capacity to LDC custome. FERC's decision that it, not the States, should control such release could eviscerate States' ability to demand that the regulatory benefits flowing from LDC capacity release go to low-volume customers who have paid, through their rates, the costs of construction and operation of that capacity.

FERC's program does not acknowledge the need for a benefit offsetting this burden. Rather, the plan mandates that capacity be released to the highest bidder (up to a ceiling rate), regardless of whether a bidder is a customer of the releasing LDC. FERC contends that this process "is not unfair to end-users who have 'paid'" for capacity because they can get released capacity "by contracting with the LDC at the FERC-approved, cost-based transportation rate, or at any lower rate that trumps competing offers." *Id.* at 14-15. In other words, a customer must pay the maximum rate or otherwise outbid all others. This result merely puts LDC customers in the same position as any other bidder, including those who have borne none of the costs of that capacity.

The imbalance between the burdens and benefits caused by FERC's plan is neither theoretical nor slight. As the amicus brief of American Gas Association and Citizen Action ("AGA Br.") points out, gas marketers, who shouldered none of the burdens, nonetheless obtained nearly 80% of all 1995 capacity release awards. AGA Br. 15. Moreover, the winning bids were at discounts ranging from 65% to 83% of the ceiling rates. *Id.* at 16. These discounts result in low-volume customers further subsidizing releases because under FERC's plan releasing LDCs, not the winning bidder, must make up the differential between the winning bid and the ceiling rate.

In sum, low-volume customers bear all the burdens of the capacity being released, but receive little, if any, benefit.

6. Respondents assert that "FERC's jurisdiction over the interstate transportation of natural gas *is wholly unrelated to the nature of the entities involved in that activity.*" PGC Br. at 16 (emphasis in original); *see* FERC Br. at 14 (petitioners' arguments "that capacity release interferes with state regulation of the LDCs' traditional role as local supplier of natural gas are similarly unfounded").

Differences in the entities involved are properly considered in deciding whether state or federal regulation would better promote the public interest. This is particularly true today where the differences between those who have the ability take advantage of unbundling and open access initiatives and those who do not, require different regulatory responses:

> The upshot of congressional and regulatory developments over the next 15 years was increasing opportunity for a consumer in that class to choose between gas sold by marketers and gas bundled with rights and benefits mandated by state regulators as sold by LDCs. But amidst such changes, two things remained the same throughout the period involved in this case. Congress did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises, and the local franchised utilities (though no longer guaranteed monopolies as to all natural gas demand) continued to provide bundled gas to the vast majority of consumers who had neither the capacity to buy on the interstate market nor the resilience to forgo the reliability and protection that state regulation provided.

Tracy, slip op. at 14.

These considerations apply to the regulation of LDC capacity release to LDC customers. FERC's program offers, at best, minimal benefits to residential and small commercial users, who are largely incapable of availing themselves of the bidding process, but who have incurred burdens related to the capacity. Determining the extent of that burden and the appropriate countervailing benefit are largely matters of local concern. Matters of local concern fall within State, not federal, jurisdiction.

7. FERC argues that the PSC Petitioners claimed that "the Commission could [not] regulate partial abandonments of service under Section 7 of the NGA." FERC Br. 12 n. 9. This misstates the PSC Petitioners' position: FERC obviously has jurisdiction to regulate partial and full abandonments. Rather, the position is that capacity release cannot be equated with partial abandonment.

Abandonment implies cessation of service. Service does not cease in the case of released capacity.[2] LDCs continue to pay all tariff charges for the capacity during the term of release (and are credited with payments received). Continued LDC payments do not signal cessation of service. Likewise, LDCs' use of this capacity in non-release periods does not show an intent to cease service.

The point is that capacity release does not have the necessary indicia of abandonment, not that FERC lacks power to regulate abandonment. Calling capacity release a partial abandonment is merely a convenient fiction to disguise FERC's usurpation of state authority.

8. PGC contends that the PSC Petitioners "distort[] the meaning of" *Texas Eastern Transmission Corp.*, 48 FERC ¶61,378 at 62,552 (1989). PGC Br. 4 n. 9. But the meaning ascribed by PGC — "that FERC acknowledged state jurisdiction over interstate capacity held by LDCs," *id.* — goes beyond that ascribed by PSC Petitioners.

PSC Petitioners view *Texas Eastern* as making the limited points (a) that a purchaser of pipeline capacity (not the pipe-

[2] Because pipeline capacity is designed to meet peak period use of the facilities, some portion of that capacity will be idle during non-peak periods when smaller volumes of natural gas move through the facilities. It has never been suggested that such idle capacity (i.e., the capacity being released under FERC's plan) is abandoned within the meaning of Section 7(b) of the NGA.

line) is considered the owner of that capacity and (b) that such capacity is considered an extension of the purchaser's delivery system. Recognizing the purchaser's rights "allow[s] the customers to step into the shoes of the [purchaser] to obtain a service comparable to, but no greater than, the rights of the [purchaser]" of that capacity. *Texas Eastern*, 48 FERC at p. 62,552. FERC's capacity release plan violates these rights by assuming capacity being released is owned by pipelines, and thus is subject to FERC jurisdiction, rather than recognizing that LDCs hold the capacity rights, subject to state regulation.

CONCLUSION

The petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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